

**REMARKS**

In response to the Office Action dated June 10, 2005, Applicants hereby elect with traverse, Group I, claims 1-41, drawn to a method and apparatus for determining the position of a rail with respect to a sensor assembly using a measured signal. As a result, claims 1-57 are pending in the instant application.

Applicants contend the restriction requirement is not proper because the features of claims 42-57 of Group II relate to more specific methods of the present invention, rather than separate inventions that are distinct from the invention of Group I. Although these features designated by the Examiner may be patentably distinct from one another, they are not the proper basis upon which a restriction should be made. In fact, the features noted in independent claim 42 are somewhat similar to those features recited in dependent claims 31 and 32 that are now designated in Group I. As a result, Applicants contend that restriction requirement is not proper.

In addition, the Examiner has included a species election in Group I, namely, Species I, claims 1-9, 22-25 and 27-41 and Species II, claims 1-21, and 26. Applicants hereby elect Species I, with traverse, since this election requirement is also deemed improper. Claim 1 is deemed generic to each designed species.

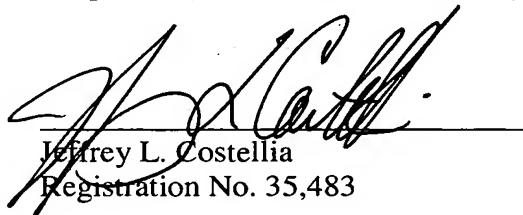
Specifically, the Species election is not proper on its face because the species are defined by the claims. As provided in M.P.E.P. 806.04(e), “[c]laims are definitions of inventions. *Claims are never species.*” Claims may be restricted to a single disclosed embodiment. Also, a claim may include two or more of the disclosed embodiments within the breadth and scope and, thus, be considered a generic or genus claim. Species are also usually independently disclosed.

Furthermore, the features of the claims of Species II are not mutually exclusive of the features of the claims of Species I in either invention Group I or II. In fact, M.P.E.P. 806.04(f) specifically states “[c]laims to be restricted to different species must be mutually exclusive.” Correspondingly, although the use of a second sensor may well be separately patentable, it is not mutually exclusive to the use of a first sensor. In fact, the user of the second sensor is disclosed as being utilized with the first sensor in the preferred embodiment of the present invention.

Finally, the species election based on the claims themselves as required by the Examiner is improper in the instant application because it would otherwise inappropriately require the Applicant to seek a divisional application for more limited features of the invention. This is not the reason species elections are provided in patent prosecution. In this case, the Examiner is attempting to designate species between the use of a single sensor for measuring the position of a first rail, and the use of a second sensor over a second rail. Although these two sets of claims may well be patentably distinct from one another, the election of species requirement is not proper since the second set of claims, or Species II (in either invention Group I or II), merely recite additional features of the present invention. If such basis for requiring species election was proper, all more limiting claims, particularly dependent claims, would always be subject to an election requirement. This is clearly not proper.

In view of the above, consideration and allowance of the instant application are now respectfully requested.

Respectfully submitted,



\_\_\_\_\_  
Jeffrey L. Costellia  
Registration No. 35,483

NIXON PEABODY LLP  
Suite 900, 401 9<sup>th</sup> Street, N.W.  
Washington, D.C. 20004-2128  
(202) 585-8000